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EXAMINER

REICHLE, KARIN M

ART UNIT PAPER NUMBER

3761

DATE MAILED: 08/28/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

DETAILED ACTION

Specification

Drawings

1. The microphotographs were received on 5-30-06. These microphotographs are approved by the Examiner. Therefore Applicant's remarks on pages 8-9 are deemed moot.

Claim Language Interpretation

2. The claim terminology is interpreted in light of the definition on page 6, lines 20-30. Lines 9-15 of claim 1 are interpreted to require a pair of first fastener components one of each being positioned on one of each of the wings both on one of the first and second surfaces and a pair of cooperating fastener components one of each being positioned on one of each of the wings both on the other of the first and second surfaces. This also applies to like language in the other independent claims 17 and 27. Claims 17 and 27 further require the one surface to be the bottom or lower surface. It is further noted that claims 17 and 27 do not require the unengaged first fastener be capable of engaging fabric of the garment (i.e. the language of these claims does not require engaging the fabric of the undergarment as does the language of claim 1 but merely the undergarment) and the claimed garment is not required to be only fabric.

Claim Rejections - 35 USC § 102

3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

4. Claims 1-9 and 17-27 are rejected under 35 U.S.C. 102(e) as being anticipated by Hammons et al '484.

In regard to claims 1-9 and 17-27, see Figures 1-10, especially Figures 7-10, i.e. the topsheet is 22, the backsheet is at least 26, the core is 24, the adhesive and the peel strip are 58-59, the first and second wings are 34, 36, see also paragraphs 84-87 of Hammons et al, i.e. can be of liquid permeable material or liquid impermeable material, the fastener components are 102, 104, see also paragraphs 88-99, 107 and 108, and thereby Scripps '724 at col. 12, lines 36-42, and thereby Noel et al '520 at, e.g., Figures, col. 6, lines 48-51 and col. 8, lines 3-9, i.e. nonwoven pattern unbonded loop material. See also Figures 6-8 and paragraphs 121-123, i.e. the fastener component is the one fastener 102, 104 directly adjacent exterior of the undergarment. It is noted that both components, i.e. the hooks and loops, include engagement members, see page 12, lines 11-12 of the instant specification. The last two subsections of claims 1, 17, and 27 recite capabilities, function or properties of the claimed structure. The Hammons et al device includes all the claimed structure. Therefore there is sufficient factual basis for one to conclude that the capabilities, functions and properties of such claimed structure is also inherent in the same structure of Hammons et al, see MPEP 2112.01. Note also the Response to arguments section *infra*.

In regard to claims 2-3, and 19-21, also note Figure 11, and paragraph 123.

In regard to claims 6, and 24, see Figures 25-28 and paragraph 142.

In regard to claim 26, see also elements 160 and 161 and paragraphs 160-164.

5. Claims 1, 6-9, 17-18 and 24-27 rejected under 35 U.S.C. 102(b) as being anticipated by Bien '929, and thus Mattingly '047.

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With regard to claims 1, 6-9, 17-18 and 24-27, see Figures of Bien, i.e. topsheet is 28, the backsheet is 30, the core is 32, the adhesive and peel strip are 34, 36 and the flaps and fastener components are set forth at col. 7, lines 29-59, and thereby Mattingly '047 at col. 6, line 44-col. 7, line 5, col. 2, lines 17-32 and col. 8, lines 9-41. It is noted that the portions of Mattingly are considered to teach that the cohesive structure in Figure 10 could be adhesive or VELCRO instead, i.e. the fastener component is the one fastener directly adjacent exterior of the undergarment. It is noted that both components, i.e. the hooks and loops of the VELCRO, include engagement members, note page 12, lines 11-12 of the instant specification. The last two subsections of claims 1, 17 and 27 as well as claims 6, 18, 24, and 26 recite capabilities, function or properties of the claimed structure. The Bien reference teaches a device which includes all the claimed structure. Therefore there is sufficient factual basis for one to conclude that the capabilities, functions and properties of such claimed structure is also inherent in the same structure of Bien et al, see MPEP 2112.01. Note also the Response to arguments section *infra*.

Claim Rejections - 35 USC § 103

6. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

7. Claims 4-5, and 22-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bien '929 in view of Leak et al '041.

Applicant claims the cooperating fastener component being of nonwoven loop material and a pattern unbonded material whereas Bien only teaches that such is a loop material.

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However, see Leak et al, col. 1, lines 40-50 and col. 8, lines 55-59 and abstract. To employ a pattern unbonded nonwoven loop material as taught by Leak et al on the Bien device as the loop material would be obvious to one of ordinary skill in the art in view of the recognition that Bien teaches a situation in which hook and loop fasteners have been employed and that such would also be economically efficient which would be desirable in any disposable article and the article of Bien being disposable. Note also the Response to arguments section *infra*.

8. Claims 2-3, and 19-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bien '929 in view of Osborn III '884.

Applicant claims nonisotropic engagement members oriented orthogonally to the attachment direction which Bien does not teach. Bien does teach the desire to use the flaps to properly position the article in the undergarment. See also Osborn III '884, Figures 44-45 and col. 45, line 67-col. 46, line 1, i.e. hooks oriented in the direction shown in the Figures improves gripping properties. To make the hooks of Bien nonisotropically formed and orthogonally oriented relative to the direction of attachment as taught by Osborn would be obvious to one of ordinary skill in the art in view of the recognition that such would improve gripping, i.e. securement would be improved which would better insure proper positioning of the article in the undergarment, i.e. accidental loss of securement would lead to improper positioning, and the desirability of proper positioning by Bien. Note also the Response to arguments section *infra*.

Double Patenting

9. Due to the number of claims under consideration, for the purposes of the following rejections the invention of the claims of the instant application will be considered a sanitary

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napkin with a pair of wings having selectively releasable interengaging first and cooperating fasteners on opposite upper and lower surfaces, respectively, of each wing including a plurality of engagement members which fasteners are capable of fastening the napkin to an undergarment, see, e.g., claim 27. The invention of the '785 patent will be considered to also be a sanitary napkin with a pair of wings having selectively releasable, interengaging fasteners on opposite surfaces of each wing including a plurality of engagement members which fasteners are capable of fastening the napkin to an undergarment but the sanitary napkin additionally includes an garment attachment adhesive and a peel strip and the napkin structure is used in a method which includes fastening the wings over the top of the napkin during removal of the peel strip, positioning the napkin in the undergarment with the adhesive and disengaging the wings from over the napkin to under the napkin and around the undergarment to further secure the napkin in the undergarment, see, e.g., claim 1 of that patent.

10. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.3218 may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground

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provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

11. Claims 1-9 and 17-27 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of U.S. Patent No. 6,843,785. Although the conflicting claims are not identical, they are not patentably distinct from each other because since the effective filing dates of the application and patent is the same, the one way *In re Vogel* test applies, i.e. are the claims of the instant application obvious in view of the patent. The answer is yes. As best understood, see discussion *supra* in paragraph 10, the claims of the instant application are both 1) generic to or broader than the claims of the patent, e.g. doesn't require all the structure and such structure to be used in the method of the patent claim only some of the structure having only the capability of being used, e.g. see last section of claim 27, and 2) narrower than the claims of the patent, e.g. requires the first fastener component on the upper surface and the cooperating component on the lower surface. With respect to 1) once an applicant has received a patent for a species or more specific embodiment, he(she) is not entitled to a patent for the generic or broader invention. This is because the specific anticipates the broader. See *In re Goodman*, *supra*. With respect to 2), the patent claims teach that the fastening components are on opposite surfaces, e.g. the first component is on the upper or lower surface and the cooperating fastener is on the opposite surface, not necessarily that the first component is on the upper surface and the cooperating fastener is on the lower surface as in the

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instant claims. However it would have been obvious to one having ordinary skill in the art at the time the instant invention was made to so locate the fastener components as instantly claimed if not already so located since it has been held that a mere reversal of the essential working parts of a device involves only routine skill in the art. In re Einstein, 8 USPQ 167.

Response to Arguments

12. Applicants remarks with regard to the matters of form have been considered but are either deemed moot in that the issue has not been repeated. Applicant's remarks on page 9 with regard to the claim language interpretation have been noted. The Examiner has provided further explanation in such section as to what the Examiner's observation was intended to mean.

Applicants remarks on pages 9, line 12-page 10, line 6, page 10, lines 18-21, the paragraph bridging pages 11-12, page 12, line 15-page 14, line 3, the second full paragraph on page 14 and pages 15-17 except for page 15, line 10 are substantially identical to those filed 8-2-04, 6-16-05, and 1-6-06 have been reconsidered but are still deemed not persuasive for the same reasons (i.e. Because such are deemed narrower than the prior art rejections, which are not only 103 rejections but also 102 rejections, the teachings of the prior art references and the scope of the claims. Applicant's attention is reinvited to the portions thereof cited supra and the discussion thereof supra. For example, with regard to the Hammonds and Bien references, the Examiner has specifically pointed out where the one of the first fasteners is unengaged with the cooperating fastener and is adapted to engage the undergarment, see, e.g., page 8, lines 2-5 and the last five lines of the 3-16-05 Office action. For another example, the Applicant's remarks in the first full paragraph on page 13 of the 6-16-05 response are narrower than the claim language,

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i.e. the claims are not method of use claims, the rejection of the claims is under 35 USC 102 and MPEP 2112.01, see page 8, lines 5-9 of the 3-16-05 Office action again. Applicant's remarks with regard to the double patenting rejection have been noted. It is clear that the instant claims are broader than the patent claims because they teach the structure, see paragraph 12 supra, but not the process of use of that structure. In response to Applicant's additional remarks bridging pages 10-11 and page 12, lines 3-13 of the 1-6-06 response, see, again, e.g., Figures 6-8 and paragraph 121, especially the last sentence thereof, of Hammons. In response to Applicant's additional comment on page 14, lines 8-10, Applicant is again redirected to the prior art rejection supra which points out where Bien teaches the claimed structure and MPEP 2112.01.

Applicant's additional comments in the last paragraph on page 16 have been considered but are deemed not persuasive in light of the record of the application which shows no process claims ever having been part thereof nor any restriction requirement rendered.)

Applicant's further remarks on pages 10-12 of the current response have been considered but also are narrower than the claim language, the teachings of Hammons et al and the prior art rejection, i.e. the claims require an unengaged first fastener be positioned so it is adapted to engage an undergarment, i.e. claiming a capability, not "will contact the undergarment" as argued, the Hammons reference does not teach a preference for adhesive fastening systems and the prior art rejection sets forth that Hammons has the claimed capability. It is especially noted with regard to Applicant's remarks in the in the first full paragraph on page 11 that Applicant's remarks are narrower than the instant disclosure which does not limit the engagement members to only hooks or hook-like members, that the definition of "engage" as defined by Webster's dictionary is "to come into contact or interlock with" and loop material also is capable of

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contacting the undergarment and, e.g., paragraph 91 of Hammons and Scripps '724 in the paragraph bridging cols. 11-12, i.e. the fastener components can be identical. With respect to the additional remarks with respect to Bien and Mattingly, which are similar to those with regard to Hammons, such remarks have been considered but also are narrower than the claim language, the teachings of Bien and Mattingly and the prior art rejection, i.e. the claims require an unengaged first fastener be positioned so it is adapted to engage an undergarment, i.e. claiming a capability, not "will contact the undergarment" as argued, the prior art rejection, i.e. Bien and thereby Mattingly have the claimed capability. It is again especially noted that page 12 does not limit the engagement members to only hooks or hook-like members and attention is again invited to the definition of "engage" discussed supra. With regard to page 15, line 10, Examiner has not refuted Applicant's statement that Leak is directed to laminates suited for use as loop components of hook and loop fasteners because it is so directed. However, the Examiner does point out that Leak at col. 9, lines 15-22 does not teach "a conventional separate, discrete patch of loop material is undesirable." as argued by Applicant.

Conclusion

13. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after

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the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any new grounds of rejection were necessitated by the cancellation of claim 28.

14. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Karin M. Reichle whose telephone number is (571) 272-4936. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tanya Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Karin M. Reichle
Primary Examiner
Art Unit 3761

KMR
August 18, 2006